



OFFICE OF THE POLICE COMMISSIONER

ONE POLICE PLAZA • ROOM 1400

January 23, 2009

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Fernando Centeno-Talavera**  
Tax Registry No. 936326  
Police Service Area 6  
Disciplinary Case No. 83437/07

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on April 28, 2008 and was charged with the following:

**DISCIPLINARY CASE NO. 83437/07**

1. Said Police Officer Fernando Centeno-Talavera assigned to the Police Service Area #6, while on duty at or about 2234 hours on May 17, 2006, in the vicinity of 2971 8<sup>th</sup> Avenue, New York County, used excessive force against an individual known to this Department, to wit: unnecessarily used pepper spray against Natalie Alexander, Erica Alexander, and Eric Brown.

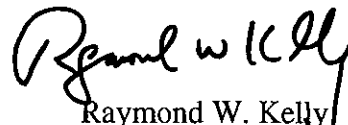
**P.G. 203-11, Page 1, Paragraph 2**

**USE OF FORCE**

In a Memorandum dated September 9, 2008, Assistant Deputy Commissioner Weisel found the Respondent **GUILTY IN PART** of the sole Specification. Having read the Memorandum and analyzed the facts of this instant matter I disapprove the finding.

There is no question that the Respondent discharged his pepper-spray during this encounter. However, based on the entirety of the circumstances and evidence, including the initial observations made by the Respondent, the conduct and actions of the complainant and her husband, along with the unsworn hearsay nature of the complainant's testimony, I find that the Respondent's use of pepper-spray was a justified and reasonable use of minimum force.

Therefore, I find Respondent Centeno-Talavera **NOT GUILTY** of the sole Specification.

  
Raymond W. Kelly  
Police Commissioner



POLICE DEPARTMENT

September 9, 2008

MEMORANDUM FOR: Police Commissioner

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Police Service Area 6  
Disciplinary Case No. 83437/07  
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PG 203-11, Page 1, Paragraph 2 – USE OF FORCE

The Department was represented by Andre Applewhite, Esq. Department Advocate's Office, and the Respondent was represented by Craig Hayes, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty in Part.

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### OVERVIEW OF THE CASE

Most of the facts in this matter are undisputed. The Respondent and his partner, Police Officer Morrison, responded to an incident inside an apartment building. There, they found Natalie Alexander striking her brother, Nathaniel, who was in a wheelchair. Natalie was using a small bag to hit Nathaniel. Natalie's companion, Eric Brown, was standing behind the wheelchair, holding its handles. When Natalie saw the officers, she put her hands and arms up. Without a warning or further instruction, the Respondent pepper-sprayed Natalie once in the face. Natalie was then arrested.

### SUMMARY OF EVIDENCE PRESENTED

#### The Department's Case

The Department called David Foster as its witness. The tape of the Civilian Complaint Review Board (CCRB) interview of Natalie Alexander was introduced as Department's Exhibit (DX) 1, and a transcript to aid the Court was introduced as DX-1a.<sup>1</sup>

#### David Foster

Foster was a CCRB investigator. The matter involving the Respondent was originally assigned to a different investigator, Estamilla. Foster had worked briefly with Estamilla and was able to recognize her voice. Foster recognized the investigator's voice on DX-1 as that of Estamilla.

In his closing report on the case, Foster noted that both Natalie Alexander and Eric Brown (the complainants)<sup>2</sup> had "poor credibility." One of the reasons Foster wrote this was due

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<sup>1</sup> The Department represented that it had made efforts to locate Natalie Alexander for the trial but was unable to do so. Eric Brown was deceased at the time of trial.

to inconsistencies in their statements, in particular Brown's "difficult to believe" claim that Natalie's child was by her side while Natalie was "assaulting" a man in a wheelchair.

Foster also investigated the complainants' criminal history. Foster believed Natalie was convicted in November 1986 of attempted murder, first-degree manslaughter, first-degree hindering prosecution, and tampering with physical evidence. Natalie had also been arrested for stabbing her "common-law husband" with a screwdriver. Foster believed she had other arrests for assault and drug sales. Foster learned during the investigation that Eric had been convicted of first-degree robbery. Foster believed Eric "had recently gotten out of jail for attempted murder," but was deceased at the time of trial.

Foster testified that Natalie was in her late 40s. She weighed between 140 and 150 pounds, and stood between 5'1" to 5'6".

#### CCRB Interview of Natalie Alexander

Estamilla interviewed Natalie Alexander on June 20, 2006. Natalie stated that she was born on July 30, 1968. She related that on May 17, 2006, at [REDACTED] an apartment building, her brother (Nathaniel) was having a birthday party. She arrived between 8:00 p.m. and 9:00 p.m. Around 9:30 p.m., Natalie stated, she wanted to go home because it was getting late and her daughter, Erica, who was with her, had school the next day. Natalie denied having drunk alcohol that night. Eric had arrived at the party earlier, so Natalie did not know if he had anything to drink.

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<sup>2</sup> The Respondent referred to Alexander as "Natalie Brown." The Advocate stated in his opening statement that Eric Brown was Natalie Alexander's boyfriend.

Natalie stated that Nathaniel, who had been drinking, started “pulling on” her outside the apartment. Natalie was “pulling away.” She got away from Nathaniel, but he “came back and . . . going towards me, again pulling on me.”

This time, Natalie “really wanted him to move off” of her. She was holding Erica’s bookbag, and Erica was by her side. Natalie began swinging the bookbag to try and get Nathaniel off of her.

Natalie asserted that “about a good fifteen” police officers arrived and “all rushed through the hallway . . . . They just came bum rushing.” Natalie “automatically dropped the bag and put my hands up in the air.” The officers “just automatically – I mean they didn’t even say ‘what happened? Hold it,’ nothing.” The officers did not ask her anything. “He just pulled out pepper spray” and began spraying.

The other officers surrounded Natalie and the spraying officer. The spraying officer was “going side to side,” which made the pepper spray reach Erica. Natalie contended that the officer “was just trying to hit everybody that was on that side.” Eric was about two feet away from Natalie.

Natalie described the officer, who pepper-sprayed her in the eyes, as short, Hispanic and light-skinned. She denied making physical contact with any of the officers.

Natalie, her daughter and Eric were all saying, “my eyes, my eyes.” About four officers “pulled” Natalie down the seven flights of stairs, and pushed her into a police car. Natalie asked, “Why did they spray me? What did I do?,” but she was not informed until she got to the precinct that she was being charged with assault. This dragging caused her to lose her sneakers, and a female officer gave her an old pair of shoes from her locker. Natalie’s assault case was pending at the time of the CCRB interview.

At the precinct, Natalie saw the officer that pepper-sprayed her filling out paperwork. She asked him questions such as why he had sprayed her and whether he could send somebody to assist Erica. The officer did not respond.

At the precinct, after about twenty minutes, an EMT washed out Natalie's eyes. She kept asking for an ambulance to be sent back to the apartment to check on her daughter, "something that they did not do. And that was wrong." A next-door neighbor, Sharita, rinsed the pepper spray out of the girl's eyes, which "really took care of her until I was able to get back to her."

Natalie told the investigator that she was fighting with her brother "[n]ot even ten, fifteen minutes" before the police arrived.

#### The Respondent's Case

The Respondent testified on his own behalf.

#### The Respondent

The Respondent joined the Department in January 2005 and was currently assigned to PSA 6 in West Harlem. He had made about 65 arrests in his career.

On May 17, 2006, the Respondent and his partner, Police Officer Morrison, received a radio run for a job at [REDACTED]. Once arriving, they heard an argument and searched floor-to-floor to find it. The Respondent found the argument, and saw Natalie Alexander "sort of like a windmill . . . . rotating her arms striking" her brother, Nathaniel Alexander, who was sitting in a wheelchair. Natalie was holding what the Respondent believed was a small pink purse, much smaller than a "backpack," while doing so. With her other arm, she was hitting Nathaniel with a closed fist. Nathaniel was bleeding from the mouth and nose. Eric Brown was

standing behind the wheelchair, holding the handles. Nathaniel may have been a little younger than the Respondent.

The Respondent asserted that Natalie, who smelled of alcohol and whose eyes were red, was intoxicated. The Respondent testified that Natalie was at least 5 to 10 feet away from him when he arrived, about the distance between the Trial Room's lectern and witness box.

The Respondent did not know the relation of the parties at that time, and thought the assailants were robbing the victim for his disability-income check. He described Eric as 6'2" to 6'3" in height, and weighing about 260 pounds. The Respondent stated that he stood at 5'6" and weighed 180 pounds. Morrison was slightly bigger, about 5'8" or 5'9".

The Respondent identified himself as a police officer and ordered Natalie to stop striking the man in the wheelchair. Natalie stopped, turned to the Respondent, "put her fists up in the air," and said to the Respondent, "[W]hat the fuck are you going to do about it"? Natalie was "upset, angry, enraged," and the Respondent "expected a fight" from Natalie and Eric. When Natalie put her hands up, the Respondent asserted, "She was going to fight." The Respondent did not recall whether Natalie was still holding the purse when she put her hands up.

The Respondent did not recall whether Eric said anything to him, including any threats of harm.

Natalie did not take any steps toward the Respondent. She put her hands up, but stood in place. The Respondent did not give Natalie any further orders. He took out his "mace" and sprayed Natalie one time.

Natalie started screaming and complaining about her eyes. As a result of the commotion, one of the apartment doors opened and Natalie's daughter (Erica) came out, ran to her mother,

and hugged her. The Respondent tried to separate Erica and Natalie, but the girl was “affected by the mist of the pepper spray.” Erica was about five or six years old.

The Respondent testified that Eric put his hand on the Respondent’s chest to try and keep him away from Natalie. Morrison called for backup, although the Respondent testified that he did not hear Morrison do so. Morrison also assisted the Respondent in dealing with Eric. As the Respondent grabbed Natalie’s wrist to try to handcuff her, she flailed her arms and twisted her hips. “She didn’t want to comply with the orders.” The Respondent told Natalie to put her arms behind her back, but she continued to fling her arms. Eric was still interfering, and it took three officers to handcuff Natalie. Even after that, the Respondent testified, she was “[s]till violent.” She was screaming and yelling, saying “why are you arresting me, that’s my brother, that’s my brother.”

After Natalie was “contained and handcuffed,” she was taken downstairs, placed in a police car and driven to the precinct. EMS came to wash out her eyes. Eric stated that he did not require medical attention.

The Respondent left Erica in the custody of a brother of Natalie, a different one than Nathaniel. The Respondent denied that Eric said he would take care of Erica himself. He also denied that Eric was simply trying to help Erica after she had been affected by the pepper spray.

The Respondent testified that he was trained in the use of pepper spray during his time at the Police Academy. He stated that there were four “levels of force”: physical contact, “chemical weapons,” “striking weapons,” and firearm. He stated that he was allowed to use a level of force one above the level he was confronted with.

The Respondent contended that using the pepper spray against Natalie “was a smart thing to do.” He “couldn’t grab her. If I grabbed her there was going to be a fight, I don’t know who



is behind me, Mr. Alexander might have attacked me from behind.” The Respondent was afraid that he “would get my eyes gouged, I get attacked.” He had been “sucker punched” in the past with no warning while trying to arrest individuals. The pepper spray “was just tactically safer and the least amount of force I could do.”

The Respondent asserted that he was trained at the Academy that a warning could be given before using pepper spray “if it’s available,” but was not required. He felt that, in the instant case, he did not have time to warn Natalie.

The Respondent conceded that Natalie had ceased using unlawful force against her brother. He agreed that the Department’s guidelines for the use of escalating force did not allow for the use of pepper spray in response to a “[f]ailure to comply with directions.”

The Department introduced the Police Student’s Guide on the “Scale of Escalating Force” (DX-2). The Respondent did not recall seeing DX-2 while assigned to the Police Academy, and stated, “There’s a page specifically assigned to pepper spray.” The Advocate stated that he obtained DX-2 from the Department’s intranet site, and asserted that it was “apparently what they use in the Police Academy to outline . . . what force the officers are allowed to use.”

On cross-examination, the Respondent agreed that DX-2 did not allow pepper spray in response to “minor physical resistance” (defined by DX-2 as “grappling, going limp, pulling or pushing away, etc.”). He conceded that Natalie and Eric did not “physically resist” before he pepper-sprayed them. On redirect examination, however, the Respondent testified that DX-2 allowed pepper spray to be used in response to “Threatened or potential physical assault likely to cause physical injury.”

### FINDINGS AND ANALYSIS

The Respondent is charged with using excessive force against three individuals – Natalie Alexander, Eric Brown, and Erica Alexander – by using pepper spray to effect the arrest of Natalie Alexander. Many of the facts are not in dispute. Both sides agree that the Respondent arrived at the scene to find Natalie Alexander striking her brother, Nathaniel, who was in a wheelchair. Eric Brown was holding the handles of Nathaniel's wheelchair as Natalie struck him with what was described as a small purse or children's bookbag. The Respondent ordered Natalie to stop striking Nathaniel. She did so.

Both sides also agree that Natalie put her hands in the air. There is, however, tacit disagreement over the meaning of what might otherwise seem to be a simple action. Natalie told the CCRB investigator that she dropped the bag and put her hands up. The Respondent, on the other hand, testified that Natalie "put her *fists* up in the air" and said, "[W]hat the fuck are you going to do about it"? The Respondent did not remember whether she was still holding the bag. Of course, if Natalie was still holding the bag, that hand at least would already have been in a fist. In any event, the Respondent viewed Natalie's action as threatening, and believed she was going to physically fight him if he moved to arrest her. Without warning, he pepper-sprayed her once in the face. She was then arrested.

The Court finds the Respondent Guilty of using excessive force against Natalie Alexander. In making an arrest, members of the Department may use only the amount of physical force necessary to overcome resistance, see Patrol Guide § 203-11, para. 2. The Specification charges the Respondent with violating this part of the Patrol Guide.

The Respondent testified that he was fearful that Natalie would attack him if he put his hands on her. The problem with his argument is that at the moment he chose to pepper-spray

Natalie, he was not faced with the choice of either grabbing her or pepper-spraying her. The Respondent stated that he was standing 5 to 10 feet from Natalie, basing this estimate on the distance between the witness stand and the lectern. In fact, based on the diagram of the Trial Room, of which this Court will take official notice, see Rules of the City of N.Y., tit. 38, § 15-04 (f), the distance is closer to 13 feet. Natalie did not move her feet toward the Respondent. Instead, she stood exactly where she was.

The Respondent had several viable options in this situation besides immediately using pepper spray. He could have, for instance, told Natalie and Eric to step away from Nathaniel and place their hands on the wall. He could have told Natalie that if she did not put her hands at her sides and calm down, she would be pepper-sprayed. Instead, without issuing a warning, he pepper-sprayed her.

The Court fully understands that members of the Department face difficult situations on patrol, and this was one of them. Indeed, the Respondent initially believed that he was witnessing a robbery of Nathaniel by Natalie and Eric. Nevertheless, by his own admission, the Respondent was 5 to 10 feet from Natalie – apparently more than that, in fact – and she did not step toward him. He was not in imminent danger of being injured by Natalie or Eric at the time he used the pepper spray. The Patrol Guide does not allow Department members to use pepper spray anytime they believe there is the *potential* for physical injury. It was not reasonable for the Respondent to take that step without first even attempting to defuse the situation by giving Natalie appropriate directions, and warning her that if she did not comply, she would be pepper-sprayed.

The Police Student's Guide (DX-2) does not require a different result. To the extent the Respondent argued that DX-2 allows the use of pepper spray anytime there is the potential of a

physical assault, such an argument is inconsistent with *Patrol Guide* § 212-95, which governs the use of pepper spray. This section directs that pepper spray may only be used when necessary. More specifically, pepper spray is not to be used where physical force is not required. It may be used, however, “where physical presence *and/or verbal commands* have not been, or would not be, effective in overcoming physical resistance.” See *Patrol Guide* § 212-95, Scope (emphasis added). Here, Natalie had stopped hitting her brother, but had raised her hands in the air. Because the Respondent failed to give her any verbal commands, he could not have determined that the physical force of pepper spray was necessary. Had he done so, the use of force might have been avoided. Thus, at the time the Respondent deployed the pepper spray, it was not a necessary use of force in response to the potential threat Natalie may have posed.

The Court also rejects the Respondent’s argument concerning the criminal records of Natalie and Eric. Because the Respondent did not know of the complainants’ records at the time he used the pepper spray, their records are not relevant to the question of whether the pepper spray was necessary.

In sum, because it was not necessary to use physical force against Natalie at that time, the Respondent is found guilty of using excessive force against her.

The Court finds the Respondent not guilty of using pepper spray against Eric and Erica. These allegations are supported only by the hearsay statements of Natalie given to the CCRB investigator. While hearsay alone may serve as the basis for an administrative finding of guilt, see *Matter of Gray v. Adduci*, 73 N.Y.2d 741, 742 (1988), it still must be sufficiently reliable and probative on the issues to be determined, see *Matter of Ayala v. Ward*, 170 A.D.2d 235 (1st Dept. 1991). In question is whether Eric was affected by the pepper spray, as the Respondent stated that he did not require medical attention, whereas Natalie stated that Eric was

complaining, “my eyes, my eyes.” Also disputed is whether Erica was even in the hallway when the Respondent sprayed Natalie, or whether, as the Respondent contended, she ran into the hallway to her mother after the Respondent sprayed Natalie.

Natalie’s criminal record is relevant to her credibility, see People v. Bermudez, 109 A.D.2d 674, 674-75 (1st Dept. 1985). The CCRB investigator, Foster, noted that he had found Natalie to have poor credibility regarding Erica’s presence at her side before the pepper spray was used, as Foster found it hard to credit Natalie’s assertion that her young daughter would be by her side as Natalie assaulted Nathaniel, Erica’s uncle. Left without any sort of corroboration of Natalie’s claims regarding Eric and Erica, the Court finds the Respondent more credible in these respects. As such, he is found not guilty of excessive force against Eric and Erica.

In conclusion, the Court finds the Respondent Guilty in Part of the Specification against him.

### PENALTY

In order to determine an appropriate penalty, the Respondent’s service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on January 10, 2005. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of improperly using his pepper spray. The Court notes the overall good Departmental record of the Respondent. The Court also notes that the Respondent’s use of the pepper spray was not wanton or gratuitous. The Respondent used the pepper spray in the course of attempting to make a valid arrest for a violent attack. Nonetheless,

the specific manner in which he used the pepper spray was improper. Under all of the relevant circumstances, the Court recommends a penalty of 5 vacation days. Cf. Disciplinary Case No. 75124/99 (15-year officer with "excellent record" forfeited 10 vacation days for pepper-spraying a seated, handcuffed prisoner inside a prisoner van solely because prisoner was kicking and screaming).

Respectfully submitted,



David S. Weisel  
Assistant Deputy Commissioner – Trials

